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IN THE

Supreme Court of the United States

No. 99-1353

FRIZZELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

GATLINBURG, L.L.C.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Pursuant to Rule 37.3(b), The Associated General Contractors of America, Inc. ("AGC") hereby moves for leave to file the accompanying brief as an *amicus curiae* in support of the position of Petitioner Frizzell Construction Company, Inc. ("Frizzell"), seeking a writ of certiorari to review the judgment of the Supreme Court of Tennessee in this case. The consent of Frizzell has been received. Respondent Gatlinburg, L.L.C. ("Gatlinburg") has withheld its consent to the AGC's submission of an *amicus curiae* brief.

The AGC is a nonprofit trade association representing and serving the interests of general contractors and other firms asso-

ciated with the construction industry, including specialty contractors, material suppliers and service providers. With 103 state and local chapters, at least one in each state and one in Puerto Rico, the AGC has approximately 7,500 regular members and 26,500 associate members. The AGC's regular members include general construction contractors engaged in many different categories of construction, including multi-family housing projects, office buildings, warehouses, shopping centers, telecommunication centers, highways, bridges, tunnels, airports, dams, water works and waste water treatment facilities, power generation facilities, and defense facilities. The AGC's associate members supply the nation's builders with, among other things, materials, labor, insurance and surety products, and professional services.

For nearly nine decades, the AGC has developed or collaborated in the development of industry standard form construction contracts. Among the goals of these documents is to promote efficient transactions and economical construction through equitable assignment of risk and responsibilities among construction project participants. The AGC produces standard form contracts for the various project delivery systems and for the many multi-tiered relationships that exist on each project: owner/contractor, contractor/subcontractor, owner/construction manager, and owner/design-builder to name a few. These and other industry-prepared documents, such as those published by the professional associations for architects and engineers, are widely used throughout the country as baseline agreements for construction projects. These documents also set forth currently accepted industry practices and customs.

By employing industry standard form contracts containing widely accepted terms and conditions, the parties to a construction project bring a greater measure of predictability, stability and consistency to their transactions. Standard form contracts, and the knowledge that consistently used language is consis-

tently understood and applied, improve the construction process.

The AGC standard form construction contracts seek not only dispute avoidance through a fair allocation of risk and responsibility but cost-effective, expedient dispute resolution through the inclusion of broad arbitration provisions. Written in plain language, they include within their scopes all matters that might bear upon the contracts, providing the parties with the certainty of knowledge that their disputes will be addressed in the manner that they chose in their contract. This is the same goal promoted by the Federal Arbitration Act ("FAA"), which mandates that agreements to arbitrate in contracts involving interstate commerce "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

The agreement at issue in this case is AGC Document No. 500—Standard Form of Agreement Between Owner and Construction Manager (Guaranteed Maximum Price Option) (1980). The agreement contained both a broad arbitration provision and a generic choice of law provision.

The decision of the Supreme Court of Tennessee thwarts the national policy in favor of the arbitration of disputes promoted by the Federal Arbitration Act, contradicts the clear precedent of this Court in interpreting the FAA, and ignores the plain language of the arbitration agreement in the AGC standard form construction management contract at issue. The AGC supports Petitioner Frizzell's Petition for a Writ of Certiorari because the Tennessee court's decision, if unchallenged, will serve as the basis for others to defeat the proper application of broad arbitration agreements and the goal of the FAA. Without consistent application, the providers, purchasers and users of construction services, as well as all those who rely upon arbitration provisions in contracts involving interstate commerce, will be harmed.

As both a supporter and publisher of standard form construction contracts that contain arbitration agreements and that are used every day throughout the country, the AGC is interested in ensuring that the terms and conditions of such documents are consistently interpreted by courts throughout the nation in conformance with established precedents. The conflict between the decision of the Supreme Court of Tennessee and the decisions of this Court must be addressed. The AGC thus seeks leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

The Associated General Contractors of America, Inc. ("AGC") submits this brief as *amicus curiae* urging this Court to grant the Petition for Writ of Certiorari of Petitioner Frizzell Construction Company, Inc. ("Frizzell").[1]

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[1] Pursuant to Rule 37.6, AGC hereby states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than AGC, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. (AGC) is a nonprofit trade association founded in 1918 to represent and serve the national interests of general construction contractors and other firms associated with the construction industry, including specialty contractors, material suppliers and service providers. The AGC has 103 state and local chapters, with at least one chapter serving the general contractors and related firms in each state, and one chapter in Puerto Rico.

The AGC has approximately 7,500 regular members and 26,500 associate members. The AGC's regular members are general construction contractors engaged in many different categories of construction, including multi-family housing projects, office buildings, warehouses, shopping centers, telecommunication centers, highways, bridges, tunnels, airports, dams, water works and waste water treatment facilities, power generation facilities, and defense facilities. The AGC's associate members supply the nation's builders with, among other things, materials, labor, insurance and surety products, and professional services.

From its inception, the AGC has sought to answer the nation's and the construction industry's needs for services and information, to demonstrate the value of construction contractors, to increase the industry's dedication to skill, integrity and responsibility, and to improve and enhance the conditions under which its members conduct their affairs. The AGC, in fact, was founded at the request of President Woodrow Wilson, who discerned the importance of the construction industry for the expeditious construction of housing and training facilities for U.S. military forces during World War I.[2] Today, the construction

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[2] Mooney, B., *Builders for Progress: The Story of the Associated General Contractors of America*, (McGraw-Hill, Inc., 1965), p.1.

industry constitutes one of the largest sectors of our national economy; its health and stability are vital to our national interests and future prosperity.

As a service to the industry, and to promote efficient transactions and economical construction for the common good, the AGC has since the 1920s undertaken or collaborated in the development, distribution, and sale of standard form construction contracts that equitably divide risks and responsibilities among construction project participants. The AGC produces standard form contracts for the various project delivery systems and for the many multi-tiered relationships that exist on each project. These and other industry-prepared documents, such as those published by the professional associations for architects and engineers, are widely used throughout the country as baseline agreements for construction projects. These documents also provide examples of appropriate risk allocation and are sources of currently accepted industry practices and customs. They lend predictability, stability and consistency to the industry's business and legal transactions, thereby speeding transactions and saving associated costs. Industry-prepared standard form contracts provide a needed degree of familiarity and normalcy to frequently high-risk, low-profit endeavors.

Construction often is a contentious business due to the multitude of parties and the unique risks involved in each project, and disputes are an all too familiar part of the construction landscape. To address disputes, most industry standard form construction contracts and many custom construction contracts contain dispute resolution provisions that provide for arbitration as a crucial part of their overall risk allocation structure. The industry perceives arbitration and other alternatives to litigation as preferable, since they yield decisions by subject matter experts that are faster, less expensive and less contentious, avoiding the complex and drawn-out procedural labyrinth attendant in court adjudication of disputes. In short, the industry recog-

nizes that protracted litigation sounds the death knell for many contractors' businesses.

Like many others, the AGC has sought to minimize the impact of construction disputes. To that end, the AGC has included arbitration provisions in its standard form construction contracts, which owners and contractors use every year to build thousands of projects throughout the United States. Such arbitration provisions are broadly written in plain language to include within their scopes all matters that might bear upon the contracts. They provide the parties with the certainty of knowledge that their disputes will be addressed in the manner that they chose in their contract.

The AGC is concerned that the decision of the Tennessee Supreme Court in *Frizzell Construction Co., Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (1999), ignores the plain language of the arbitration agreement in the AGC standard form construction management contract, which establishes that "[a]ll claims, disputes or other matters in questions arising out of, or relating to, this Agreement * * * shall be decided by arbitration" and that "[t]his Agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law." As the Tennessee Supreme Court concedes in its decision, the construction management contract clearly involved interstate commerce, rendering it subject to the Federal Arbitration Act, as the "prevailing arbitration law." Ignoring the plain language of the arbitration agreement frustrates the AGC's purpose of providing the construction industry with standard form contracts that are easily understood and applied.

The most troubling ramification of this decision, however, is that it flouts established federal case precedent and the strong federal policy in favor of the enforceability of arbitration agreements. To allow this decision to stand invites other state courts to carve out random exceptions to the uniform applica-

tion of the Federal Arbitration Act, thereby frustrating the Act's underlying purposes. Parties entering into contracts that involve interstate commerce no longer will rest assured that an essential element of their bargain, the agreement to arbitrate, will be given effect.

The AGC has appeared as amicus curiae in several of this Court's recent cases, including *Brown v. Pro Football, Inc.*, 518 U.S. 231, 116 S.Ct. 1754 (1996); *NLRB v. Town & County Electric, Inc.*, 516 U.S. 85, 116 S.Ct. 450 (1995); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 113 S.Ct. 1190 (1993).

SUMMARY OF ARGUMENT

The opinion of the Supreme Court of Tennessee is contrary to the clear precedent established by this Court upholding the arbitrability of contract claims, including claims for fraudulent inducement of a contract, pursuant to the Federal Arbitration Act ("FAA"). The national policy established by the FAA guarantees that agreements to arbitrate claims arising out of contracts involving interstate commerce "shall be valid, irrevocable, and enforceable." This Court has interpreted the FAA to uphold arbitration even if a rule of state law would otherwise exclude a claim from arbitration. For those involved in the construction industry and for those using standard form construction contracts, the FAA and this Court's precedent interpreting it, foster predictability and consistency in the business and legal transactions that occur everyday in the construction industry.

The Tennessee Supreme Court's decision thwarts this Court's precedent and frustrates the interests of those who seek predictability, stability and consistency in commercial transactions. The Tennessee Supreme Court not only ignored the clear precedents of this Court, it also ignored the persuasive authority of the United States Court of Appeals for the Sixth Circuit. If

unchallenged, the opinion of the Tennessee Supreme Court will cast a pall upon the legal and business environment in which members of the construction industry and all others involved in interstate commerce operate. Without the predictability afforded by the FAA and this Court's interpretation of the FAA, the enforceability of agreements to arbitrate contained in the countless standard from contracts in use today will vary from forum to forum. As a result, those who look to arbitration as a viable, expeditious and less expensive alternative to litigation will not know whether their agreement to arbitrate will be enforceable or illusory.

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE TENNESSEE SUPREME COURT THWARTS THE GOAL OF THE FAA AND FRUSTRATES THE OBJECTIVES OF THE AGC AND ITS MEMBERS.

The Federal Arbitration Act has as its goal the promotion of arbitration of claims that arise under contracts involving interstate commerce. The FAA, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

This policy is founded on the mandate that agreements to arbitrate in such contracts "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The value of arbitration as compared to litigation, is hardly questioned. As this Court has noted, "liti-

gation is costly and time-consuming, and * * * judges are less adapted to the nuances of the disputes that typically arise" in particular transactions than are those people chosen as arbitrators because of their unique expertise. *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 747 (1981) (Burger, C.J., and Rehnquist, J., dissenting).

In contrast, arbitration can provide a "swift, fair, and inexpensive remedy." *Id.* at 748. One of the key advantages of arbitration is that it allows the parties to the agreement to select arbitrators who are experienced in the area that is the source of the dispute. In the case of construction disputes, arbitrators are often drawn from the ranks of contractors, architects, engineers, construction managers and construction attorneys. The familiarity of these individuals with the construction process enables them to more quickly grasp technical complexities and industry practices than would a judge or jury.

The AGC shares with the FAA the goal of promoting arbitration as an alternative to litigation. Only one year after the FAA was enacted in 1925, the AGC board of directors passed a resolution endorsing the principle of arbitration and further recommending that agreements to arbitrate be included in construction contracts. (*See,* J. Lail, *Replacing Confrontation With Cooperation,* 1995 Wiley Construction Law Update, Ch. 1). Arbitration, and alternative dispute resolution in general, are a means of reducing the high level of risk attendant to the construction process. The complex nature of a construction project and the variety of participants who must coordinate their efforts and responsibilities provide fertile ground for disputes. Disputes are a well known but unwelcome element of the construction process, costing the parties to the construction project time and money and the commitment of resources that could be devoted to other business opportunities.

The AGC standard form contract documents promote arbitration, and other forms of alternative dispute resolution, as a means of addressing disputes in a timely and cost-effective manner. The agreement between Petitioner Frizzell and Respondent Gatlinburg was AGC Document No. 500—Standard Form of Agreement Between Owner and Construction Manager (Guaranteed Maximum Price Option) (1980). This standard form document contained a broad arbitration provision, which provided in pertinent part:

> All claims, disputes and other matters in questions arising out or, or relating to, this Agreement or the breach thereof, * * * shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties agree otherwise. This Agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law.

Petitioner's App. 2a, 15a.

Petitioner Frizzell and Respondent Gatlinburg adopted the AGC standard form contract and the agreement to arbitrate contained therein as the complete expression of their bargain. The agreement to arbitrate was broadly written to include within its scope all manner of dispute that might arise from the contract. Through such arbitration provisions, the AGC standard form contract documents provide a means of addressing disputes through a subject matter expert chosen by the parties, without the expense, delay and procedural complexity involved in litigation.

The AGC standard form construction contracts, as well as those published by other industry organizations such as those for architect and engineers, seek to bring uniformity and pre-

dictability to the business and legal transactions attending the construction process.

The decision of the Tennessee Supreme Court effectively thwarts this objective by ignoring the plain language of the standard form arbitration provision and in reading the choice of law provision to incorporate state law precluding the arbitration of claims of fraudulent inducement. The generic choice of law provision contained in the construction management agreement between Petitioner Frizzell and Respondent Gatlinburg ("This Agreement shall be governed by the law of the place where the Project is located" *See Frizzell,* 9 S.W.3d at 79; Petitioner's App. 2a & n.1.), does not demonstrate an intent of the parties to incorporate Tennessee law contrary to the FAA.

The Tennessee Supreme Court's reading of the arbitration and choice of laws provisions undermines the predictability and consistency of transactions that is the goal of the standard form contract document and the AGC. As will be discussed further herein, the Tennessee court's reading of the agreement contradicts the precedents of this Court. To the extent prior decisions of this Court have generated confusion over the correct application of the FAA and arbitration and choice of law provisions in state court actions, this Court should take the opportunity to dispel such confusion and grant certiorari.

Left unchallenged, the ruling of the Tennessee Supreme Court will serve as a basis for other state courts to undermine the national policy of the FAA by broadly applying generic choice of law provisions to preclude the arbitration of disputes arising from agreements otherwise subject to the FAA. Parties to agreements containing broad arbitration provisions will not know the certainty of an essential element of their bargain, the method by which they chose to address disputes. Instead, the enforceability of agreements to arbitrate otherwise governed by the FAA will be subject to forum shopping and the willingness

of parties to employ the gambit of claiming fraudulent inducement as a means of avoiding arbitration. The result will be to increase legal costs, fill crowded court dockets and to delay further the resolution of commercial disputes. These are precisely the perils identified by the Sixth Circuit in its decision in *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926 (6th Cir. 1998).

Certiorari should be granted so that this Court may confirm the proper application of the FAA to standard contractual arbitration provisions in contracts implicating interstate commerce. A clarification of this issue will not only benefit Petitioner Frizzell, the AGC and its members, and other participants in the construction industry, but all those who employ arbitration as a means of resolving commercial disputes. This Court should grant certiorari to ensure that such disparity of results, contrary to the goal of the FAA, do not continue to occur and that arbitration agreements subject to the FAA are enforced consistently and in accordance with this Court's precedent.

II. THE RULING OF THE TENNESSEE SUPREME COURT CONFLICTS WITH THE PRECEDENTS OF THIS COURT.

This Court has held that a contractual choice of law provision incorporating state law, in a contract otherwise subject to the FAA, will not displace the FAA's directive that arbitration provisions are enforceable, even where state law precludes arbitration of a claim. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The Tennessee Supreme Court ignored this precedent, holding that the incorporation of Tennessee law operated to preclude the arbitration of a claim for fraudulent inducement of contract. That the Tennessee Supreme Court has chosen to ignore the clear precedent of this Court provides grounds for certiorari. *See* S. Ct. Rule 10(c).

The FAA enunciates a national policy of promoting arbitration of claims that arise under contracts involving interstate commerce. This policy is founded on the mandate that agreements to arbitrate in such contracts "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court established as a matter of substantive federal law, that "a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud", "even in the face of a contrary state rule." *Id.* at 400, 402. Absent a claim that the arbitration clause itself was induced by fraud, the arbitration provision was broad enough to encompass a claim of fraudulent inducement. *Id.*

In *Mastrobuono v. Shearson Lehman Hutton, Inc., supra,* this Court enunciated the rule that a generic choice of law provision is not evidence that the parties intend to incorporate state law that conflicts with federal arbitration rules. Together, *Prima Paint* and *Mastrobuono*, answer the question addressed by the Tennessee Supreme Court. The generic choice of law provision contained in the construction management agreement between Petitioner Frizzell and Respondent Gatlinburg does not demonstrate an intent of the parties to incorporate Tennessee law contrary to the FAA. As such, the choice of law provision does not render unenforceable the broad arbitration provision contained in the same construction management agreement, as applied to a question of fraudulent inducement of contract.

As discussed in greater detail in the Petition for Writ of Certiorari of Petitioner Frizzell, the Tennessee Supreme Court clearly ignored the precedent of this Court, most specifically this Court's holding in *Mastrobuono.* While acknowledging the applicability of the FAA to the Agreement in question and accepting the basic principle of *Prima Paint* that claims of fraudulent inducement will be subject to arbitration, the Tennessee Supreme Court nonetheless parts company with this Court

on the effect of the choice of law provision. This Court in *Mastrobuono* sought to harmonize a broad arbitration provision with a choice of law provision, so as to give both proper effect. In *Mastrobuono*, the respondent argued that the choice of law provision evidenced the parties' intent to incorporate New York law that, under a decision of the New York Court of Appeals, precluded arbitrators from awarding punitive damages. The Court rejected this argument. The generic choice of law provision at issue was not an unequivocal exclusion of punitive damages claims from arbitration under New York law, and therefore did not operate to limit the scope of the arbitration provision. This Court properly understood the generic choice of law provision as a substitute for the conflict of law analysis that otherwise would determine what law to apply to disputes arising out of contractual relationships. As such, the choice of law provision was not intended to inhibit the enforceability of the arbitration provision. Rather, this Court stated:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

514 U.S. at 63-64.

Faced with the very same issue presented here, the Sixth Circuit, the federal circuit in which Tennessee is located, expressly invoked *Mastrobuono* in harmonizing a "conspicuously broad" arbitration provision with a generic choice of law provision incorporating Ohio law. *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926 (6th Cir. 1998). Ruling that the choice of

law provision was not an unequivocal inclusion of Ohio law precluding arbitration of the claim of fraudulent inducement, the Sixth Circuit found resonance for its decision not only in the decisions of other circuits "but also in policy and common sense." *Id.* at 937-938. This conflict between the ruling of the Sixth Circuit in *Ferro* and the Supreme Court of Tennessee is but one more basis for this Court to grant certiorari. *See* S. Ct. Rule 10(b).

In contrast, the Tennessee Supreme Court finds that the generic choice of law provision at issue herein applies to decide what claims are even subject to arbitration. Thus, the state court retained jurisdiction over the question of whether the contract was fraudulently induced. The Tennessee Supreme Court can find no support for its decision in this Court's holding in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). Arguably, the *Volt* decision was overruled by this Court's later ruling in *Mastrobuono*. Further, contrary to being an exception to the applicability of the FAA, *Volt*, at best, stands for the proposition that a choice of law provision incorporating state procedural rules of arbitration will be upheld where those rules are designed to encourage the resort to arbitration, consistent with the national policy of the FAA. More precisely, *Volt* concerned a state rule determining "the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself." *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 688 (1996).

The failure of the Tennessee Supreme Court to acknowledge the precedents of *Mastrobuono* and *Ferro* supports the granting of certiorari in this matter. *See* S. Ct. Rule 10(b), (c).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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